Supreme Court, U.S.
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No. 00 174

In The Supreme Court of the United States

FRANK JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A *WRIT* OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR *WRIT* OF *CERTIORARI*

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QUESTION PRESENTED FOR REVIEW

Is it unfairly prejudicial, and violative of a defendant's right to a fair trial, for a federal prosecutor (1) to present to the jury evidence that the defendant told an alleged accomplice to give police an explanation for the defendant's conduct but to not take a polygraph examination, (2) to present evidence that the defendant told an individual that if investigated he, the defendant, would take a polygraph examination, and (3) to argue to the jury that this evidence concerning polygraphs showed that the defendant wanted the accomplice to lie about the defendant's role in the alleged offense and showed that the defendant was lying at trial?

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OPINIONS AND ORDERS BELOW

The written opinion of the United States Court of Appeals for the Fourth Circuit, dated April 4, 2000, will not be published. It is set out in the Appendix at page A-1.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit upholding the Petitioner's conviction was issued on April 4, 2000. The Petitioner's Petition for Rehearing and Rehearing En Banc was denied by the Fourth Circuit on May 9, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]

Fed. R. Evid. 402 states:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules

prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Fed. R. Evid. 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

On October 6, 1998, Petitioner Frank Jones and co-defendant Delando Kale were charged with the commission of mail fraud in violation of 18 U.S.C. §§ 1341 and 2. After entering a plea of not guilty, Jones was found guilty in a jury trial in the Florence Division of the United States District Court for the District of South Carolina. Jones was subsequently sentenced to a term of 46 months in prison, plus a term of 3 years of supervised release.

The government alleged at trial that Jones, the Mayor of the Town of Sellers, South Carolina, falsified payroll records of certain employees of Sellers by inflating their time sheets and then, when those employees received their inflated paychecks, took back for himself the difference between what

the employees actually earned and what they were paid. While investigating the alleged crime, an FBI agent obtained the payroll records of Connie Hunt, a former part-time Sellers employee, and then questioned Hunt at her new place of employment. Hunt told the agent that while working for Sellers she had received pay for work that she did not perform and had then given part of her paycheck back to Jones. Hunt then agreed to tape record a telephone call with Jones in the presence of the agent. Shortly after this telephone conversation, which was played for the jury, Hunt spoke again with Jones over the telephone in a conversation which was not recorded, and Jones allegedly told her that if government agents asked her to take a polygraph test she did not have to do it. The prosecutor emphasized the mentioning of the polygraph in his questioning of Hunt:

> Q. IN THAT LAST PHONE CALL THAT DAY WHEN HE CALLED AND SAID: YOU DON'T NEED TO TAKE THE POLYGRAPH, WHAT DID YOU TAKE THAT TO MEAN AS TO WHY HE WAS SAYING THAT TO YOU?
>
> A. BECAUSE IF I TOOK A POLYGRAPH TEST AND IF THERE WAS QUESTIONS ASKED ABOUT ME GIVING HIM MONEY, I WOULD HAVE TO SAY, YES; AND IF I TOOK A POLYGRAPH TEST, IT WOULD SHOW. AND HE TOLD

ME I DIDN'T HAVE TO TAKE ONE SO THAT WOULDN'T COME OUT.

(Tr. at 164-65; App. at A-12.)

In addition, the government questioned Philesa Braddy, who also had worked for Jones, about a letter written by Jones which contained a boycott threat of the funeral home of a political opponent. Braddy testified that she typed the letter for Jones and that Jones had told her that she should tell investigators that she did not know anything about the letter. The prosecutor then specifically asked Braddy what Jones had said about what he would do about the letter:

Q. DID HE SAY WHAT HE WOULD SAY TO THE F.B.I.?

A. HE SAID HE WOULD TAKE A LIE DETECTOR TEST AND SAY THAT HE DIDN'T KNOW ANYTHING ABOUT IT.

(Tr. at 283; App. at A-16.)

In addition, a second FBI agent who became involved in the investigation of Jones testified that he was with Connie Hunt when she made her series of telephone calls with Jones, two of which were tape recorded. That agent told the jury that in the third call made by Jones to Hunt he heard Hunt say, "'LIE DETECTOR TEST' AS LIKE IN A QUESTION FORMAT." (Tr. at 428; App. at A-19.) The agent then testified that he told Hunt to write down exactly what her recollection of the

telephone call was on a sheet of paper and that Hunt wrote down the words, "DON'T TAKE LIE DETECTOR TEST." (Tr. at 429; App. at A-20.)

Jones testified in his own behalf and denied responsibility for any overstating of the time worked by employees on their time sheets, noting that the employees filled out their own cards and that he did not closely supervise the filling out of time sheets. In cross-examining Jones, the prosecutor referred again to the polygraph statement raised in the questioning of Braddy:

> Q. YOU TOLD HER YOU WERE GOING TO LIE TO THE F.B.I., TOO, AND TAKE A LIE DETECTOR?
>
> A. NO, SIR.

(Tr. at 574; App. at A-21.) In closing argument, the prosecutor emphasized the statements concerning polygraph examinations, stating at one point:

> FRANK JONES SAYS: I'M GOING TO LIE TO THE F.B.I., TAKE A POLYGRAPH.
>
> WHY IS THAT COMING IN?
>
> BECAUSE IT GOES TO SHOW A PLAN, OPPORTUNITY, LACK OF MISTAKE, COMMON SCHEME. FRANK

> JONES EXPECTS MORE THAN JUST SOME WORK OUT OF HIS EMPLOYEES. THEY HAVE TO GIVE A LITTLE EXTRA FOR THE PRIVILEGE OF WORKING FOR SELLERS, WHETHER IT'S SEX OR LYING TO THE F.B.I. OR GIVING KICKBACKS. IT'S GOT TO BE SOMETHING. THAT'S WHAT WE'RE SEEING HERE.

(Tr. at 631-32; App. at A-22-23.) The prosecutor then repeated the allegation that Jones told Hunt not to take a polygraph examination, and stated:

> I SUBMIT THE ONLY REASON YOU'RE TELLING SOMEBODY DON'T TAKE A POLYGRAPH IS, YOU'VE JUST TOLD THEM WHAT YOU WANT THEM TO SAY AND YOU KNOW THAT'S A LIE.
>
> . . . .
>
> YOU DON'T WANT THEM TAKING THE POLYGRAPH AND HAVING THE AGENTS SAY, OKAY, WE KNOW YOU'RE LYING.

(Tr. at 642; App. at A-24.)

On appeal, Jones raised two issues, arguing that (1) the introduction of voluminous amounts of evidence concerning alleged sexual improprieties on the part of Jones with his employees was irrelevant and unfairly prejudicial, and (2) the

introduction of the evidence concerning the taking of polygraph examinations was unfairly prejudicial. In its per curiam decision upholding Jones's conviction, the United States Court of Appeals for the Fourth Circuit ruled that the evidence of Jones's sexual misconduct was admissible because it established the context within which Jones's unlawful conduct occurred. *United States v. Jones*, No. 99-4534 (4th Cir. Apr. 4, 2000). With regard to the polygraph evidence, the court found that, although the results of a polygraph test are generally not admissible, the statements concerning polygraphs were admissible as evidence of Jones's consciousness of guilt.

REASON FOR GRANTING THE WRIT

THE PROPRIETY OF ADMITTING EVIDENCE CONCERNING POLYGRAPH EXAMINATIONS IS A RECURRING ISSUE WHICH DIVIDES THE LOWER COURTS, AND THIS COURT MUST PROVIDE GUIDANCE ON THE SUBJECT AND MUST ESTABLISH A RULE THAT IT IS UNFAIRLY PREJUDICIAL FOR A PROSECUTOR TO PRESENT EVIDENCE CONCERNING THE WILLINGNESS OR UNWILLINGNESS OF A DEFENDANT OR WITNESS TO TAKE A POLYGRAPH EXAMINATION.

Two years ago, in *United States v. Scheffer*, 118 S. Ct. 1261 (1998), this Court discussed the reliability of polygraph evidence in the context of the issue of the per se ban on the

introduction of polygraph evidence under Rule 707 of the Military Rules of Evidence. That Rule provides:

> (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, *or any reference to an offer to take, failure to take, or taking of a polygraph examination,* shall not be admitted into evidence.

(Emphasis added.) The Court in *Scheffer* upheld the validity of the exclusion of evidence through this Rule on the basis of the principle that the type of evidence which the Rule excluded was not worthy of consideration and would not validly assist a factfinder in reaching a conclusion regarding the guilt or innocence of the accused. Indeed, noting that Rule 707 served the interests of "ensuring that only reliable evidence is introduced at trial" and of "preserving the jury's role in determining credibility," eight members of this Court determined that "there is simply no consensus that polygraph evidence is reliable." 118 S. Ct. at 1264, 1265. Justice Thomas's opinion for this Court thus found that the per se ban on polygraph evidence in all military trials "is a rational and proportional means of advancing the legitimate interest in barring unreliable evidence." *Id.* at 1266.

While clarifying that polygraph evidence is unreliable and upholding a per se ban on such evidence in military cases, the *Scheffer* decision has nevertheless failed to resolve the ongoing debate concerning the propriety of admitting evidence

concerning polygraphs in the courts. *see* S. Hyatt, *Developments in the Law of Scientific Evidence: The Admissibility of Polygraph Evidence*, 18 J. Nat'l Ass'n of Admin. L. Judges 171 (Fall 1998), and has failed to clarify for lower courts how polygraph evidence is to be treated in the absence of a rule banning such evidence. Further guidance from the Court is needed. If, as a large majority of the members of this Court have explicitly found, there is no consensus that polygraph evidence is at all reliable and that it is thus reasonable to ban any mention of polygraph results "or any reference to an offer to take, failure to take, or taking of a polygraph examination" in military trials, as in *Scheffer*, then it cannot be consistent with the Due Process Clause or with Federal Rules of Evidence 402 and 403 to permit prosecutors to introduce such evidence against defendants in other federal criminal trials.

Recent federal and state decisions regarding polygraph evidence, both before and after *Scheffer*, are in conflict with regard to the reasoning and holding of *Scheffer*, with some courts properly finding that such evidence concerning polygraphs is unfairly prejudicial and must be excluded. *United States v. Kwong*, 69 F.3d 663 (2d Cir. 1995) (polygraph evidence inadmissible under Rule 403), *cert. denied*, 116 S. Ct. 1343 (1996); *United States v. Sherlin*, 67 F.3d 1208 (6th Cir. 1995) (finding polygraph results excludable under Rule 403), *cert. denied*, 116 S. Ct. 795 (1996); *Conti v. Commissioner*, 39 F.3d 658 (6th Cir. 1994) (excluding polygraph evidence because of prejudicial influence on the jury);*United States v.*

Waters, 194 F.3d 926 (8th Cir. 1999) (polygraph evidence supporting defendant's professed innocence was properly excluded under Rule 403; dissent argues that rejection of polygraph evidence on the basis of Rule 403 was inappropriate); *Palmer v. City of Monticello*, 31 F.3d 1499 (10th Cir. 1994) (prejudicial impact of polygraph evidence outweighed its probative value); *Maddox v. Cash Loans of Huntsville II*, 21 F. Supp. 2d 1336 (N.D. Ala. 1998) (polygraph evidence inadmissible under Rule 403 because probative value of polygraph evidence is negligible and its effect would be highly prejudicial and lead to jury confusion); *United States v. Saldarriaga*, 179 F.R.D. 140 (S.D.N.Y. 1998) (results of polygraph which defendant took were inadmissible as a matter of law); *Goins v. Angelone*, 52 F. Supp. 2d 638 (E.D. Va. 1999) (because *Scheffer* permits exclusion of polygraph evidence, no *Brady* violation by state's failure to notify defendant of results of polygraph examination of government witness); *State v. Trevino*, 980 P.2d 552 (Idaho 1999) (upholding exclusion of polygraph information); *State v. Weatherspoon*, 583 N.W.2d 391 (N.D. 1998) (*Scheffer* interpreted to permit exclusion of offer by state for defendant to take polygraph and acceptance by defendant of offer); *State v. Council*, 515 S.E.2d 508 (S.C. 1999) (upholding trial court's decision to deny admission of polygraph examination taken by defendant's accomplice); *Jackson v. State*, 992 S.W.2d 469 (Tex. Crim. App. 1999) (polygraph evidence is unreliable, so there is no requirement that indigent defendant be afforded the services of a polygraph examiner), and some courts finding that such evidence may be admissible without unfair prejudice. *United States v. Jones;*

United States v. Posado, 57 F.3d 428 (5th Cir. 1995) (polygraph evidence not per se inadmissible); *United States v. Cordoba*, 104 F.3d 225 (9th Cir. 1997) (polygraph evidence not per se inadmissible); *Paxton v. Ward*, 199 F.3d 1197 (10th Cir. 1999) (trial court improperly excluded polygraph evidence; declining to follow *Scheffer*); *People v. Jefferson*, 705 N.E.2d 56 (Ill. 1998) (upholding decision of trial court permitting the state to introduce evidence regarding defendant's agreement to take polygraph examination).

Moreover, it is clear that the position of the Fourth Circuit in this case fails to recognize the true cost to a defendant of the introduction of unfairly prejudicial polygraph evidence. Volumes of scientific studies have found polygraph validity rates which are so low as to be barely more reliable than resorting to chance. *See* United States Congress, Office of Technology Assessment, *Scientific Validity of Polygraph Testing: A Research Review and Evaluation* 96-97 (1983) (polygraph examinations are capable of producing "significant error rates"; citing polygraph studies that revealed validity rates of approximately 60%); Douglas Carroll, *How Accurate Is Polygraph Lie Detection in the Polygraph Test: Lies, Truth and Science* 19, 22-27 (Anthony Gale ed., 1988) (finding accuracy rates that varied from an average of approximately 80% to approximately 60%); Benjamin Kleinmuntz & Julian J. Szucko, *On the Fallibility of Lie Detection*, 17 L. & Soc'y Rev. 85, 96 (1982) (conducting a study that revealed a 37% misclassification rate of innocent testees as guilty); David T. Lykken, *The Validity of Tests: Caveat Emptor*, 27 Jurimetrics

J. 263, 265 (1987) (quoting an overall validity of approximately 70%, or 20% better than chance). One noted commentator has stated that "most psychologists reviewing the literature . . . suggest [polygraph accuracy] figures in the 63-72% range." Edward W. Cleary, *McCormick on Evidence* § 206, at 626-27 (3d ed. 1984).

The American Medical Association has not endorsed the use of polygraphs and has strongly questioned the validity of polygraph results. *Council Report: Polygraph*, 256 JAMA 1172, 1175 (1986). It should be noted also that the Employee Polygraph Protection Act, 29 U.S.C. §§ 2001-2009, was passed by Congress in 1988 to prohibit the use of polygraph tests for preemployment screening or during the course of private employment.

Because of this accumulation of scientific skepticism about polygraph testing, it has long been recognized in the majority of courts that evidence that the accused or a witness has passed or failed a polygraph test is inadmissible at trial. *See United States v. Ruhe*, 191 F.3d 376 (4th Cir. 1999); *United States v. A&S Council Oil Co.*, 947 F.2d 1128 (4th Cir. 1991); *United States v. Scarborough*, 43 F.3d 1021 (6th Cir. 1994). Moreover, because of the pseudo-scientific, yet inherently unreliable, nature of polygraph testing, courts have long found that juries can be improperly influenced not simply by being told of polygraph test results but also by hearing testimony that the defendant or a witness was administered a polygraph examination, even where the actual results of that examination are not mentioned. *United States v. Brevard*, 739 F.2d 180 (4th

Cir. 1984). The obvious problem with such evidence with regard to a prosecution witness is the implication arising from the evidence that the witness is truthful because of his passing a polygraph test. With regard to a defendant, the problem is far more damaging, for the necessary implication from such testimony is that the defendant must have failed the examination or he would not have been prosecuted. In *United States v. Brevard*, for example, the court held that an FBI agent's references to a polygraph examination required the reversal of the defendant's armed bank robbery conviction in light of the inference arising from the agent's testimony that the government decided to charge the defendant after he had been given the polygraph test. The court found in *Brevard* that the consequences of such an improper inference could not be cured by judicial instruction for the inference was critical to the issue of the credibility of the defendant. *See also United States v. Gantley*, 172 F.3d 422 (6th Cir. 1999) (there was a manifest necessity for a mistrial where evidence was introduced regarding fact that defendant had taken a polygraph examination); *United States v. Call*, 129 F.3d 1402 (10th Cir. 1997) (district court properly excluded evidence that defendant took a polygraph test; even if polygraph test evidence could be admitted under Rule 702, it must still survive the rigors of Rule 403, and evidence regarding polygraphs should be excluded because of the danger that the jury may overvalue polygraph evidence as an indicator of truthfulness); *Pettigrew v. Hardy*, 403 F. Supp. 869 (D. Ariz. 1975) (on habeas review, affirming the state trial court's conclusion that a mistrial was necessary

after the defendant testified that he had passed a lie detector test).

In addition to these situations, the courts have also recognized in the type of situation presented by the present case that testimony that a defendant or witness offered or refused to take a polygraph examination is equally prejudicial, for such testimony unfairly affects the jury's assessment of the credibility of the party about whom the evidence is introduced. For example, in *United States v. St. Clair*, 855 F.2d 523 (8th Cir. 1988), the defendant was charged with conspiracy to construct a destructive device. At trial, a state police officer mentioned to the jury that the defendant had refused to take a polygraph test. The district court denied a request for a mistrial and gave a cautionary instruction to the jury admonishing them to disregard the testimony concerning the polygraph. After the defendant's conviction, he argued on appeal that the district court had erred in denying his motion for mistrial. Citing *Rothgeb v. United States*, 789 F.2d 647 (8th Cir. 1986), the court of appeals first concluded that it was improper for a witness to testify whether or not a criminal defendant has refused to submit to a polygraph test. Because the credibility of the defendant was an important issue in the trial, the court further held that the error could not be harmless and was therefore a basis for a new trial. *See also United States v. Murray*, 784 F.2d 188 (6th Cir. 1986) (a curative instruction was not enough to remedy an experienced FBI agent's deliberate statement that he had asked the defendant to take a polygraph test); *Garmon v. Lumpkin County, Georgia*, 878 F.2d

1406 (11th Cir. 1989) (a defendant's refusal to submit to a polygraph examination cannot be used as incriminating evidence and is inadmissible; refusal of alleged victim of a crime to submit to polygraph examination is not admissible to impeach the veracity of the victim's story); *Ferby v. Blankenship*, 501 F. Supp. 89, 92 (E.D. Va. 1980) (on habeas review, affirming the state trial court's conclusion that, after a witness testified that the defendant was willing to take a lie detector test, a mistrial was appropriate because "[curative] instructions could not preserve the integrity of the verdict").

In this case, Jones was unfairly prejudiced by the polygraph references which permeated the trial. The trial court permitted repeated references in testimony and argument by the prosecutor regarding the statement that Jones would offer to take a polygraph test and that Jones counseled his employee Hunt not to take a polygraph test. As discussed in the cases set out above, all of this testimony and argument was designed precisely to raise the inference—using unfairly prejudicial evidence—that Jones was found to have lied to investigators and that he was also lying to the jury—a technique which violates due process and Fed. R. Evid. 402 and 403. The inference precisely raised by the evidence that Jones had taken and failed a polygraph examination. Indeed, the argument of the prosecutor explicitly invited this inference, as he told the jury that the polygraph evidence showed that Jones was lying. Referring to Jones's statement to Hunt, the prosecutor stated:

> THEN, HE CALLS BACK THE THIRD TIME. UNFORTUNATELY, AS YOU

HEARD AGENT LONG, HE HAD REWOUND THE TAPE. HE HAD A CHOICE: TRY TO RECORD THE LAST TWO OVER THE OTHER TWO OR SIT TIGHT. HE SITS TIGHT.

WHAT DOES FRANK JONES SAY?

DON'T TAKE A POLYGRAPH. IF YOU THINK SOMEBODY IS GOING TO TELL THE TRUTH AND NO PROBLEM. WHY IS THERE A NEED TO SAY: DON'T TAKE A POLYGRAPH?

I SUBMIT THE ONLY REASON YOU'RE TELLING SOMEBODY DON'T TAKE A POLYGRAPH IS, YOU'VE JUST TOLD THEM WHAT YOU WANT THEM TO SAY AND YOU KNOW THAT'S A LIE.

(Tr. at 641-42; App. at A-24.) The Fourth Circuit's decision, resting in large part on the conclusions that "the statements did not involve the results of a polygraph test, or allow for an inference of the results of a polygraph test," and that "the statements were not used to impeach or bolster the credibility of a witness." *United States v. Jones*, slip op. at 2, is thus plainly erroneous and reveals a failure to recognize the prejudicial nature of such evidence. In addition, the introduction of this evidence, and the accompanying improper argument by the prosecutor, clearly cannot be viewed as

harmless error, *see United States v. Brevard; United States v. St. Clair; United States v. Murray,* particularly in view of the fact that no limiting instruction was given to the jury with regard to the polygraph evidence.

Because this Court has plainly indicated its belief that evidence concerning the taking of polygraph examinations is unreliable and unfairly prejudicial, this case presents an excellent opportunity for the Court to clarify the situations in which polygraphs may or may not be brought to the attention of juries in federal criminal trials, while correcting the error of the trial court and court of appeals.

CONCLUSION

For all of the foregoing reasons, the Petitioner, Frank Jones, requests this Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	No. 99-4534
FRANK JONES.	)	
Defendant-Appellant.	)	

Appeal from the United States District Court
for the District of South Carolina, at Florence.
Cameron McGowan Currie, District Judge.
(CR-98-885)

Submitted: March 20, 2000

Decided: April 4, 2000

Before NIEMEYER, MOTZ, and TRAXLER,
Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Robert E. Lee, MCINTOSH & LEE, Florence, South Carolina; Debra O. Jackson, Florence, South Carolina, for Appellant. J. Rene Josey, United States Attorney, William E. Day, II, Assistant United States Attorney, Thomas E. Booth, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Frank Jones appeals his conviction and sentence on one count of mail fraud and attempt to commit mail fraud in violation of 18 U.S.C. §§ 1341, # 2 (1994). On appeal, he contends that the district court erred by admitting polygraph evidence and by admitting evidence of Jones' sexual conduct with his employees. Finding no reversible error, we affirm.

Jones was mayor of the Town of Sellers, South Carolina. The evidence established that Jones arranged for town employees to be paid for hours they did not work. The employees then gave the money earned for those hours to Jones. At trial, there was testimony that Jones told an employee involved in the scheme to refuse to take a polygraph

test if federal investigators asked her to take one. There was also evidence that Jones told another town employee that he would take a polygraph test and tell investigators that he was not aware of an incriminating letter. Furthermore, there was evidence that Jones abused his position by engaging in sexual misconduct in exchange for favors and loans.

A district court's evidentiary rulings are reviewed for abuse of discretion. *See United States v. Ruhe*, 191 F.3d 376, 387-88 (4th Cir. 1999). We find that the court did not abuse its discretion in admitting Jones' statements regarding polygraph tests. The results of a polygraph test are generally not admissible. *See id.; but see United States v. A & S Council Oil Co.*, 947 F.2d 1128, 1134-35 (4th Cir. 1991) (evidence of the results of a polygraph test were admissible to uncover the basis for an expert's opinion). Here, however, Jones' statements were clearly evidence of his consciousness of guilt. Moreover, the statements did not involve the results of a polygraph test, or allow for an inference of the results of a polygraph test. In addition, the statements were not used to impeach or bolster the credibility of a witness.

We also find that the district court did not abuse its discretion by admitting evidence of Jones' sexual misconduct with female town employees. Evidence of other acts "is not admissible to prove the character of the person." *See* Fed. R. Evid. 404(b). Such evidence is admissible, however, to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* Rule 404(b) is a rule of inclusion. *See United States v.*

Aramony, 88 F.3d 1369, 1377 (4th Cir. 1996). Evidence is admissible under Rule 404(b) if it is "(1) relevant to an issue other than character, (2) necessary, and (3) reliable." *United States v. Rawle*, 845 F.2d 1244, 1247 (4th Cir. 1988) (footnotes omitted). Admissible evidence must be excluded if the "probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403.

The evidence of Jones' sexual misconduct was relevant to Jones' intent to commit mail fraud because it showed his abuse of authority. The evidence was necessary because it established the context within which Jones' unlawful conduct occurred. *See Aramony*, 88 F.3d at 1378 (evidence that defendant charged with fraud used position to provide an advantage when making sexual advances to employees was necessary). The evidence was reliable. It was based upon the testimony of witnesses who were subjected to Jones' conduct, and the evidence was "not so preposterous that it could not be believed by a rational and properly instructed juror." *Id.* at 1378.

In addition, the probative value of the evidence was not out-weighed by unfair prejudice. The court gave the jury a limiting instruction on the evidence. Furthermore, the nature of the evidence was not so offensive as to "create a genuine risk that the emotions of the jury would be excited to irrational behavior." *Aramony*, 88 F.3d at 1378.

We affirm the conviction and sentence. We dispense with oral argument because the facts and legal contentions are

adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
May 9, 2000

No. 99-4534
CR-98-885

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

FRANK JONES

Defendant - Appellant

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,
/s/ Patricia S. Connor
CLERK

[CONNIE HUNT]:

A. I WAS AT FLORENCE DARLINGTON TECH; AND JEFF LONG AND ANOTHER F.B.I. AGENT MET ME AT THE OFFICE, AND I MADE A CALL TO THE TOWN HALL IN SELLERS.

Q. DID YOU REACH FRANK JONES THE FIRST TIME YOU TRIED TO CALL HIM?

A. WELL, I TRIED TO CALL ON THE PRIOR THURSDAY, BUT I COULDN'T GET ANYONE IN THE OFFICE. SO, ON SATURDAY, I CALLED; AND I REACHED HIM ON THE FIRST ATTEMPT.

(THE TAPE RECORDING REFERRED TO WAS PLAYED.)

MR. LEE: YOUR HONOR, COULD WE STOP ONE MOMENT?

THE COURT: ALL RIGHT.

(BENCH CONFERENCE HELD OFF THE RECORD.)

BY MR. DAY:

Q. LET'S GO ON NOW TO THE SECOND RECORDED CONVERSATION.

(THE TAPE RECORDING REFERRED TO WAS PLAYED.)

BY MR. DAY:

Q. WERE ANY MORE CALLS MADE FROM FRANK JONES TO YOU THAT DAY?

A. FRANK CALLED ME AGAIN. PROBABLY FIVE TO TEN MINUTES AFTER THAT SECOND PHONE CALL, HE CALLED ME.

Q. WAS ANYONE WITH YOU AT THAT TIME?

A. JEFF LONG AND THE OTHER F.B.I. AGENT WAS IN THE OFFICE.

Q. WAS THAT CONVERSATION RECORDED?

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A. NO.

Q. WHY NOT?

A. BECAUSE THEY WERE REWINDING OR LISTENING TO THE CONVERSATION THAT WE JUST HAD, AND THEY COULDN'T GET IT BACK TO A SPOT WHERE THEY COULD RECORD IT. SO, I JUST HAD TO PICK IT UP AND ANSWER IT WITHOUT IT BEING RECORDED.

Q. I SHOW YOU GOVERNMENT EXHIBIT 16C AND ASK YOU IF YOU CAN IDENTIFY THAT?

A. YES.

Q. HOW ARE YOU ABLE TO IDENTIFY THAT?

A. THAT'S MY WRITING. I WROTE THAT.

Q. THE TOP PORTION OF THAT, WHEN DID YOU WRITE THAT?

A. ON 9-5-98 AT 9:37.

Q. WHY DID YOU WRITE THAT?

A. FRANK JONES CALLED ME BACK AND TOLD ME --

Q. IS THIS THE UNRECORDED CALL?

A. YES, THIS IS THE UNRECORDED CALL.

HE CALLED ME AND TOLD ME, IF THEY ASK ME TO TAKE A POLYGRAPH TEST, THAT I DIDN'T HAVE TO DO IT.

I SAID, "A LIE DETECTOR TEST?"

AND HE SAID, "YEAH. YOU DON'T HAVE TO TAKE A LIE DETECTOR TEST IF YOU DON'T WANT TO. THEY CAN'T MAKE YOU."

I SAID, "OKAY."

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AND THAT CALL LASTED FOR APPROXIMATELY ONE MINUTE.

Q. ON 9-16, WHAT IS THAT?

A. ON 9-16 AT 9:30, FRANK CALLED ME TO TELL ME THAT HIM AND DELANDO KALE WAS INDICTED.

I SAID, "YOU WERE?"

AND HE SAID, "YEAH."

I SAID, "LET ME CALL YOU BACK."

AND THAT WAS THE END OF THE CONVERSATION.

THEN 16D. THIS WAS ON 9-9 AT 2:44 P.M. HE JUST CALLED TO ASK ME IF THE F.B.I. AGENT HAD GOT IN CONTACT WITH ME; AND HE SAID HE THOUGHT WILLIE FORE WAS BEHIND THE INVESTIGATION AND THAT THE ATTORNEY FOR THE TOWN, TIM--I DON'T RECALL HIS LAST NAME--WROTE A LETTER ASKING FOR THE RECORDS BACK FROM THE F.B.I. AND HE THINKS THAT HAD SOMETHING TO DO WITH IT. AND HE SAID IT WAS UP TO HIM IF HE WANTED TO PAY ME SALARY.

HE SAID, "DON'T LET PEOPLE SCARE YOU. YOU KNOW HOW TO HANDLE THEM."

WE TALKED ABOUT TEN MINUTES THAT DAY.

Q. NOW, THE FIRST CONVERSATION, WHEN HE SAID: WHAT THEY GONE WANT TO KNOW IS IF YOU GAVE ME ANY OF YOUR MONEY. YOU. HAVE I HAVE EVER BORROWED ANY MONEY FROM YOU. ALL YOU GOT TO DO IS TELL THEM, NO.

YOU SAID: SO.

THAT'S IT.

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YOU WANT ME TO TELL THEM NO. THAT I--

YEAH.

THAT I DIDN'T GIVE YOU ANYTHING.

NO. NO. THAT'S RIGHT. YOU DO THAT, YOU'RE GOING TO HAVE ME IN A MESS, YOU UNDERSTAND.

WHAT DID YOU TAKE THAT THAT HE WAS TALKING ABOUT?

A. THAT HE DIDN'T WANT ME TO TELL THE F.B.I. AGENT THAT THAT I WAS GIVING HIM MONEY OUT OF MY CHECK, THAT I WAS WRITING DOWN HOURS

THAT I DIDN'T WORK SO I COULD GIVE HIM MONEY OUT OF MY CHECK.

Q. HE SAID: YOU JUST STAND BY YOUR STORY, YOU KNOW WHAT I MEAN? AS FAR AS YOU GAVE ME ANYTHING BACK THEN, YOU DON'T HAVE TO SAY NOTHING ABOUT THAT, CONNIE.

YOU SAID: OKAY.

HE SAID: BECAUSE YOU WAS DOING ME A FAVOR WHEN I HAD MY BACK INJURY, BECAUSE YOU KNEW THE WORK I DONE.

WHAT DID YOU TAKE THAT TO MEAN?

A. JUST THAT, IF THEY ASKED ME ANYTHING, NOT TO TELL THEM ANYTHING ABOUT ME GIVING HIM MONEY. BECAUSE HE HURT HIS BACK, AND HE SAID THE TOWN WASN'T PAYING HIM ENOUGH MONEY AND THAT WAS THE ONLY INCOME THAT HE HAD COMING IN, AND WOULD I DO THAT FOR HIM AND NOT JUST WORRY ABOUT IT AND NOT LET THEM SCARE ME INTO TELLING THAT I WAS DOING THAT FOR HIM.

Q. THEN, HE SAID, AND THEN THEY WILL COME UP WITH DID

I GET ANY PART OF YOUR PAY; JUST SAY, NO, NO. FRANK NEVER SAID NOTHING TO ME LIKE THAT.

WHAT DID YOU TAKE THAT TO MEAN?

A. THAT I WASN'T GIVING HIM ANY OF MY MONEY. JUST TO TELL YOU GUYS, NO, THAT I WASN'T DOING THAT.

Q. AND WHEN HE SAID: NO, BUT YOU DON'T HAVE TO TELL THEM NOTHING ON ME OR AGAINST ME OR ANYTHING.

YOU SAID: OKAY.

HE SAID: SO, YOU GOT IT DOWN NOW? YOU'RE SURE?

WHAT DID YOU TAKE THAT TO MEAN?

A. THAT HE WANTED ME TO LIE AND SAY I DIDN'T GIVE HIM ANY MONEY OR HE DIDN'T ASK ME TO DO THAT FOR HIM.

Q. AND WHEN HE SAID THAT THEY TALKED TO KALE FOR FIVE MINUTES AND THAT WAS THE END OF IT, WHY DO YOU THINK HE WAS SAYING THAT TO YOU?

A. WELL, BECAUSE DELANDO TOLD ME THAT HE WAS ALSO GIVING FRANK PART OF HIS MONEY.

MR. LEE: OBJECTION.

THE COURT: SUSTAINED.

LADIES AND GENTLEMEN, THE STATEMENT SHE MADE CONCERNING WHAT DELANDO TOLD HER IS STRICKEN.

BY MR. DAY:

Q. IN THAT LAST PHONE CALL THAT DAY WHEN HE CALLED AND SAID: YOU DON'T NEED TO TAKE THE POLYGRAPH, WHAT DID YOU TAKE THAT TO MEAN AS TO WHY HE WAS SAYING THAT TO

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YOU?

A. BECAUSE IF I TOOK A POLYGRAPH TEST AND IF THERE WAS QUESTIONS ASKED ABOUT ME GIVING HIM MONEY, I WOULD HAVE TO SAY, YES; AND IF I TOOK A POLYGRAPH TEST, IT WOULD SHOW. AND HE TOLD ME I DIDN'T HAVE TO TAKE ONE SO THAT WOULDN'T COME OUT.

MR. DAY: THAT'S ALL I HAVE, YOUR HONOR. I JUST WANT TO MAKE SURE I OFFER EXHIBITS 16C AND D INTO EVIDENCE.

MR. LEE: WITHOUT OBJECTION.

THE COURT: ADMITTED.

MR. DAY: I THINK THE TAPE AND TRANSCRIPTS ARE IN.

THE COURT: THEY ARE IN.

YOU MAY CROSS EXAMINE.

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THE COURT: ALL RIGHT. MS. HUNT, YOU'RE ON CROSS EXAMINATION, SO YOU SHOULD NOT DISCUSS YOUR TESTIMONY WITH ANYONE, INCLUDING THE GOVERNMENT ATTORNEYS OR AGENTS. DURING THE EVENING RECESS.

DO YOU UNDERSTAND?

THE WITNESS: YES.

THE COURT: MR. LEE, YOU HAD A QUESTION OF DIRECT QUESTIONING OF HER ABOUT THE TELEPHONE CONVERSATION NOT RECORDED THAT TOOK PLACE ON DECEMBER 8TH.

DO YOU WANT TO PUT THAT ON THE RECORD?

MR. LEE: YES.

THE COURT: PRIOR TO THE GOVERNMENT ELICITING QUESTIONS OF THIS WITNESS CONCERNING THE THIRD TELEPHONE CONVERSATION THAT TOOK PLACE ON THE 5TH OF SEPTEMBER 1998, THERE WAS A BENCH CONFERENCE AT WHICH TIME MR. LEE RAISED THE ISSUE CONCERNING THE POLYGRAPH STATEMENT. HE OBJECTED TO THE WITNESS BEING ASKED ABOUT THAT CONVERSATION BECAUSE SHE WOULD BE REFERRING TO A POLYGRAPH EXAMINATION OR, AT LEAST, TO MR. JONES' ALLEGED STATEMENT TO HER THAT SHE DID NOT HAVE TO TAKE A POLYGRAPH AND THAT THEY COULD NOT MAKE HER TAKE A POLYGRAPH.

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THE COURT DID NOT FIND THAT TESTIMONY TO BE OBJECTIONABLE AND THEREFORE OVERRULED THE OBJECTION.

IS THERE ANYTHING THAT EITHER SIDE WANTS TO PUT ON THE RECORD CONCERNING THAT NOW?

MR. LEE: NOT FROM THE DEFENDANT, YOUR HONOR.

THE COURT: ALL RIGHT. THEN, WE'LL START BACK AT 9:30 TOMORROW MORNING.

HAVE A NICE EVENING.

(RECESS.)

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YOU COULD, LOOK AT THAT AND SEE IF YOU RECOGNIZE THAT.

[PHILESA BRADDY]:

YES, SIR. THAT'S THE LETTER, THAT SAME LETTER. THAT I WROTE IT OUT BEFORE I TYPED IT.

Q. HOW DID YOU KNOW WHAT TO WRITE OUT?

A. I WROTE IT AS MR. JONES TOLD IT TO ME.

MR. DAY: WE OFFER GOVERNMENT'S EXHIBIT 32.

I ASSUME THERE'S THE SAME OBJECTION.

MR. LEE: I RENEW MY OBJECTION.

THE COURT: ALL RIGHT. ADMITTED OVER OBJECTION.

BY MR. DAY:

Q. DID YOU EVER TALK TO MR. JONES ABOUT THIS LETTER WHEN IT WAS BEING MAILED OR AFTER IT WAS MAILED?

A. YES, SIR.

Q. TELL US ABOUT THAT.

A. I HAD TOLD HIM THAT I WAS GOING TO BE ASKED ABOUT THIS LETTER, AND HE SAID THAT I SHOULD JUST SAY THAT I DIDN'T KNOW ANYTHING ABOUT IT.

Q. DID YOU EVER HEAR MR. JONES SAY ANYTHING TO ANYONE ABOUT THAT LETTER?

A. NO, SIR.

Q. WHEN YOU SAY YOU WERE GOING TO BE ASKED. DID YOU TALK ABOUT WHO MIGHT BE ASKING YOU ABOUT THIS LETTER?

A. I WAS TOLD THAT THE F.B.I. MIGHT ASK ME ABOUT THE LETTER.

Q. WHAT DID MR. JONES SAY TO YOU ABOUT WHAT TO SAY TO

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THE F.B.I.?

A. HE JUST SAID TO SAY THAT I DIDN'T KNOW ANYTHING ABOUT IT.

Q. DID HE SAY WHAT HE WOULD SAY TO THE F.B.I.?

A. HE SAID HE WOULD TAKE A LIE DETECTOR TEST AND SAY THAT HE DIDN'T KNOW ANYTHING ABOUT IT.

Q. DID YOU TALK TO THE F.B.I.?

A. YES, SIR.

Q. WHAT DID YOU TELL THEM?

A. I TOLD THEM I TYPED IT.

Q. PARDON?

A. I TOLD THEM I TYPED IT.

MR. DAY: PERMISSION TO PUBLISH?

THE COURT: ALL RIGHT.

MR. DAY: MAY WE APPROACH THE BENCH?

THE COURT: ALL RIGHT.

(BENCH CONFERENCE OFF THE RECORD.)

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Q. WHAT DID YOU TELL HER YOU WANTED HER TO DO?

A. I WANTED HER, BASICALLY, TO ASK FRANK WHAT SHE WANTED HER TO DO--WHAT HE WANTED HER TO DO. AS SHE EXPLAINED, THAT WE HAD COME UP AND QUESTIONED HER ABOUT RECORDS AND TIME CARDS AND HER INVOLVEMENT. IT WASN'T ANY SECRET THAT THE CASE HAD BEEN GOING ON.

AND, SO, I HAD HER MAKE THE CALL, ASK FRANK SOME QUESTIONS JUST TO SEE WHAT HIS RESPONSES WOULD BE AND TO SEE IF HE WOULD TALK ABOUT HIS INVOLVEMENT.

Q. DID YOU RECORD THAT?

A. YES, I DID.

Q. WHAT HAPPENED AFTER THE FIRST CALL WAS RECORDED?

A. WE MADE THE FIRST CALL. AND VERY SHORTLY THEREAFTER THAT FIRST CALL WAS MADE. A RETURN CALL. THE PHONE RANG. WE

WERE SITTING IN THE OFFICE, AND WE WERE KIND OF SURPRISED ALL OF A SUDDEN THE PHONE RANG.

Q. WHO WAS THERE?

A. CONNIE HUNT, SPECIAL AGENT MAURICE KELLAHER FROM THE MYRTLE BEACH OFFICE WAS THERE AND MYSELF.

I HADN'T YET HAD TIME--USUALLY, AT SOME POINT, I WILL REWIND THE TAPE. MAKE SURE I ACTUALLY RECORDED THE

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CALL. THE ONLY WAY TO DO THAT IS TO LISTEN TO IT. BUT I DIDN'T HAVE ENOUGH TIME TO REWIND THE TAPE, AND THE PHONE RANG.

CONNIE PICKED IT UP, AND IT WAS FRANK. AND, SO, WE SCRAMBLED TO GET THE SMALL, LITTLE EAR PIECE THAT GOES INTO THE PHONE TO PUT IT UP TO YOUR EAR. AND YOU HOLD THE PHONE UP TO YOUR EAR, AND THAT LITTLE MICROPHONE WILL RECORD THE VOICE COMING IN, FRANK JONES' VOICE; AND IT WILL PICK UP CONNIE HUNT'S VOICE AS SHE TALKS.

WE GOT THE PIECE INTO HER EAR, INTO THE PHONE, AND WE WERE FORTUNATE TO GET THE SECOND CALL, THE RETURN CALL.

Q. WHAT HAPPENED AFTER THAT CONVERSATION?

A. WE WAITED A SHORT PERIOD OF TIME. I THOUGHT IT WAS LONG ENOUGH. AND, THEN, I WENT AHEAD AND STARTED TO REWIND THE TAPE.

THE PHONE RANG AGAIN. IT WAS FRANK AGAIN. AND I INITIALLY TRIED TO FAST-FORWARD THE TAPE BECAUSE I HAD THE CALL, THE FIRST TWO CALLS. I DIDN'T WANT TO TAPE OVER THOSE CALLS AND DESTROY IT. SO, I DIDN'T--IT HAPPENED SO FAST THAT I DIDN'T GO AHEAD AND PUT THE EAR PIECE INTO HER EAR AND TRY TO MESS WITH THE TAPE. I JUST WENT AHEAD AND SAID, WELL, WE WEREN'T GOING TO BE ABLE TO RECORD THAT CALL.

Q. HOW LONG WAS THAT THIRD CALL?

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A. THE THIRD CALL WAS VERY SHORT. IT WAS UNDER A MINUTE LONG.

Q. DID YOU HEAR CONNIE HUNT OR FRANK JONES SAY ANYTHING DURING THAT CALL?

A. I COULDN'T HEAR FRANK. I WASN'T MONITORING THE CALL WITH ANY KIND OF DEVICE.

SO I COULDN'T HEAR FRANK'S VOICE. BUT I HEARD CONNIE HUNT.

MR. LEE: OBJECTION. HEARSAY.

MR. DAY: I THINK THAT IS ADMISSIBLE UNDER 803.1 AS A CONTEMPORANEOUS STATEMENT.

THE COURT: OVERRULED.

MR. LEE: YOU HONOR, FOR THE RECORD, ISN'T THIS VOUCHING OR ALMOST PITTING THE WITNESS?

THE COURT: MOTION OVERRULED.

THE WITNESS: I WAS STANDING RIGHT NEXT TO CONNIE; AND SHE SAID, "LIE DETECTOR TEST" AS LIKE IN A QUESTION FORMAT. THAT WAS THE ONLY THING THAT I RECALL HEARING HER SAY ON THE PHONE.

THE PHONE--THE CALL WAS TERMINATED, AND THAT WAS THE END OF THAT CALL.

BY MR. DAY:

Q. WAS ANYTHING WRITTEN DOWN AFTER THAT CALL?

A. I HAD CONNIE MAKE A NOTE IMMEDIATELY FOLLOWING THE CALL. I TOLD HER TO WRITE THE

GIST, BASICALLY, OF THAT PHONE CALL AND THE TIME THAT IT CAME IN. I WENT AHEAD

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AND MADE A NOTE OF IT, AND--

Q. I ASK YOU IF YOU RECOGNIZE GOVERNMENT'S EXHIBIT 16C OR 16D, WHICHEVER?

A. GOVERNMENT'S EXHIBIT 16C, I RECOGNIZE AS THE PIECE OF PAPER THAT CONNIE WROTE AFTER I TOLD HER TO WRITE IT DOWN EXACTLY WHAT HER RECOLLECTION OF THE PHONE CALL WAS ON THIS YELLOW PIECE OF PAPER HERE. IT'S GOT "9:37 TO 9:38." WHICH WAS THE TIME, A.M.

IT STATES: DON'T TAKE LIE DETECTOR TEST.

SHE THEN DATED IT 9-5-98 AND WROTE "JEFF LONG." MY NAME, UNDERNEATH THAT DATE.

THE SECOND NOTE, I WASN'T THERE FOR THAT. SO, I DON'T KNOW ABOUT THAT.

LIKEWISE, WITH GOVERNMENT 16D, I WASN'T THERE DURING THAT CALL. SO, I DON'T RECOGNIZE THAT.

MR. DAY: PERMISSION TO PUBLISH 16D AND C, YOUR HONOR?

THE COURT: GRANTED.

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Q. YOU HAD LESA BRADDY TYPE THAT LETTER?

A. YES, I DID. I'M NOT DENYING THAT LETTER.

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Q. YOU TOLD HER IF THE F.B.I. CAME AROUND TO LIE?

A. THAT'S INCORRECT.

Q. TO SAY YOU DIDN'T KNOW ANYTHING ABOUT IT?

A. THAT'S INCORRECT.

Q. YOU TOLD HER YOU WERE GOING TO LIE TO THE F.B.I., TOO, AND TAKE A LIE DETECTOR?

A. NO, SIR.

Q. THEN, THEN, YOU WENT OVER TO LUEVENIA WRIGHT'S HOUSE AND TOLD HER YOU DIDN'T KNOW ANYTHING ABOUT THE LETTER?

A. THAT LETTER IS POLITICAL, AND IT'S BEEN SINCE '97.

Q: YOU SAID IT'S NOT A LIE; IT'S A POLITICAL CAMPAIGN?

A. SHE WAS MAKING ATTACKS, SO WE MADE ATTACKS BACK. AND I WROTE THE LETTER.

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LESA BRADDY, CLERICAL. DOES THE PAYROLL WITH FRANK JONES. CLOSELY SUPERVISED. FRANK JONES ALWAYS THERE. HE HAS HER WRITE THE LETTER TO LUEVENIA WRIGHT; SAYS: DON'T TELL PEOPLE IT'S FROM ME.

YOU'LL SEE ON THERE IT'S GOT A CARBON COPY GOING TO HIMSELF. IF THE F.B.I. COMES AROUND AND ASKS ABOUT IT, LIE TO THE F.B.I. TELL THEM YOU DON'T KNOW ANYTHING ABOUT THIS LETTER.

FRANK JONES SAYS: I'M GOING TO LIE TO THE F.B.I..

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TAKE A POLYGRAPH.

WHY IS THAT COMING IN?

BECAUSE IT GOES TO SHOW A PLAN, OPPORTUNITY, LACK OF MISTAKE, COMMON SCHEME. FRANK JONES EXPECTS MORE THAN JUST SOME WORK OUT OF HIS EMPLOYEES. THEY HAVE TO GIVE A LITTLE EXTRA FOR THE PRIVILEGE OF WORKING FOR SELLERS, WHETHER IT'S SEX OR LYING TO THE F.B.I. OR GIVING KICKBACKS. IT'S GOT TO BE SOMETHING. THAT'S WHAT WE'RE SEEING HERE.

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THEN, I THINK MR. JONES TESTIFIED, WELL, I WAS JUST TRYING TO GET HER TO COME DOWN TO WORK SO I COULD TELL HER NOT TO CALL ME ANYMORE.

SO, WHAT'S HE DO?

HE CALLS HER RIGHT BACK A SECOND TAME.

WHAT DOES HE SAY AGAIN?

HEY, DELANDO KALE WAS OKAY.

AND THAT'S THROUGHOUT. REMEMBER. DELANDO KALE TESTIFIED ABOUT TELLING FRANK JONES: HEY, I'VE BEEN CALLED; NO PROBLEM, ET CETERA. AND IT'S TWO YEARS LATER. YOU KNOW, FRANK JONES THOUGHT, WELL, THEY HAVE GONE AWAY. DELANDO KALE STONEWALLED, AND IT WORKED. HE'S SAYING: BE LIKE DELANDO. HOLD UP. YOU'LL BE FINE.

HE CALLS BACK, SAYS DELANDO KALE WAS OKAY. YOU KNOW, DON'T LET THEM FOOL YOU. DON'T LET THEM TRICK YOU.

TRICK YOU INTO WHAT? TALKING ABOUT DOZENS AND DOZENS OF TIMES THE WAY SHE DID.

HOW DO YOU TRICK SOMEBODY INTO THAT?

THEN, HE CALLS BACK THE THIRD TIME. UNFORTUNATELY, AS YOU HEARD AGENT LONG, HE HAD REWOUND THE TAPE. HE HAD A CHOICE: TRY TO RECORD THE LAST TWO OVER THE OTHER TWO OR SIT TIGHT. HE SITS TIGHT.

WHAT DOES FRANK JONES SAY?

DON'T TAKE A POLYGRAPH. IF YOU THINK SOMEBODY IS GOING TO TELL THE TRUTH AND NO PROBLEM, WHY IS THERE A

NEED TO SAY: DON'T TAKE A POLYGRAPH?

I SUBMIT THE ONLY REASON YOU'RE TELLING SOMEBODY DON'T TAKE A POLYGRAPH IS, YOU'VE JUST TOLD THEM WHAT YOU WANT THEM TO SAY AND YOU KNOW THAT'S A LIE.

THE COURT: FIVE MINUTES.

MR. DAY: THANK YOU.

YOU DON'T WANT THEM TAKING THE POLYGRAPH AND HAVING THE AGENTS SAY, OKAY, WE KNOW YOU'RE LYING.